IN THE

Supreme Court of the United States

OCTOBER TERM 1955

ALMA SCHULZ, Administratrix of the Estate of AUGUST M. SCHULZ,

Petitioner,

—v.—

THE PENNSYLVANIA RAILROAD COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner, Alma Schulz, Administratrix of the Estate of August M. Schulz, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the above entitled matter.

The Opinions of the Courts Below

The oral opinion of Judge David N. Edelstein, granting the motion of the defendant for direction of verdict in its favor (p. 62a) is printed in the appendix hereto, and is unreported.

The opinion of the Circuit Court of Appeals for the Second Circuit by Chief Judge Clark is printed in the appendix hereto (pp. 30a and 31a) and is reported in 222 Fed. 2d 540.

Jurisdiction

The decision and judgment of the Court of Appeals for the Second Circuit, sought to be reviewed, was decided and entered on May 3, 1955.

The jurisdiction of this Court is found in 28 U. S. Code, Sections 1254(1) and 2101(c).

Questions Presented

1. Whether the Court of Appeals in affirming the judgment of the Court below erroneously differed with the opinion of the Court of Appeals for the Fourth Circuit in the case of *Sadler* v. *Pennsylvania Railroad*, 159 F. 2d 784, which held that proximate cause need not be established by direct evidence but may be proved by circumstances and which also held that it was for the jury to determine the cause of the fall from the reasonable inferences which cannot be said to be speculative.

2. Whether the Court of Appeals in affirming the judgment of the Court below erroneously deviated from the principles of law established by this Court in the case of *Lavender* v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916, and in failing to grant a retrial and permit the case to go to the jury to settle the dispute by choosing the most reasonable inference and that this did not involve speculation and conjecture.

Statutes Involved

"46 U. S. C. A. Sec. 688. Recovery for injury to or death of seaman.—Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with

the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

"45 U. S. C. A. Sec. 51. Every common carrier by railroad while engaging in commerce between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or territories and any foreign nation or nations shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees, of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

Statement of the Case

This action was brought under the Jones Act to recover damages for the benefit of the widow and 2 infant children of the deceased by reason of his death resulting from the negligence of the Pennsylvania Railroad Com-

pany. At the time of his death he was 36 years of age and his widow was 31 [illegible] left 2 children, Judith, 3 years and Cynthia, 9 months. His earnings were $3000. per year and he was employed as a fireman by the defendant railroad (p. 41 Trans.).

On December 25, 1949 decedent, August M. Schulz Jr., was assigned as a fireman with a tour of duty from 5 p. m. to 1 a. m. the following morning. The dispatcher, James H. Corcoran, assigned him to watch 4 tugboats docked for the night at Pier H, Jersey City, New Jersey (p. 4a). He left his wife that Christmas Day at about 2:30 in the afternoon with his lunch packed in a paper bag (p. 3a). He phoned the dispatcher about 4 p. m. and told him he was going to be late (p. 4a). The dispatcher then called Barker, another fireman, and asked him to check the boats until Schulz arrived which he did (p. 5a). Schulz came in at 5:15 p. m. and the dispatcher told him Barker had checked the tugs (p. 5a). Barker testified that the dispatcher told him he was short of firemen and requested him to check the boats until Schulz came in (p. 33a), that the 4 tugboats, Altoona, Princeton, Fort Wayne and the Williamsport, were abreast of each other, that the one nearest the dock was Altoona and the 4th boat out was the Williamsport (p. 34a), that Barker pumped the boilers with water, threw coal on the fires and pumped the bilges as he went from one boat to the other and finished checking the boats shortly after 5 p. m. (p. 34a), that he put on the injectors to put in water and then took off all injectors on all boats before he left them (p. 35a) including the Williamsport (p. 35a), that he met Schulz and walked down to the office with him around 5 o'clock (p. 35a) and Schulz said "Well, I got to go and get the clothes out of the locker". (p. 35a).

The dispatcher, Corcoran, said Schulz left in his street clothes to go aboard the boats and returned a little after

7 o'clock and said he had just completed rechecking the boats and was going to change his clothes and go to work (p. 6a), that between 7 and 7:15 he left the office and walked in the direction of the tug Altoona where it was docked at the pier and that was the last he saw him (p. 6a).

Corcoran testified that Schulz was the only fireman attached to those 4 tugboats during the time mentioned (p. 8a) except for the time when Barker had them (p. 9a).

Frederick Stetson, assistant foreman of engines, stated his duties are the maintenance of the boats and he checks on everything (p. 14a). That night he was aboard the Altoona, the tug next to the pier, at about 12:15 and found the fires practically out (p. 15a), that the second time he went aboard the Altoona at about 1:25 a. m. he found Schulz's street clothes hanging in the upper engine room of the Altoona where the firemen usually undress (p. 18a).

Casamento was a fireman employed by defendant and Altoona was one of the tugs to which he was assigned on the evening of December 25th and he stepped aboard the Altoona about 12:30 a. m. and the fires were poor, the water in the boiler was low and the steam was low (p. 52a) and these fires were unattended to for 2, 3, or 4 hours.

Charles Andrei was a tug fireman assigned to work that night from 11 p. m. to 7 a. m. He was assigned to 2 tugs, the Princeton and the Williamsport, which was the 4th boat out (p. 37a). It was mentioned that they were short men and he went right over to look at the boats (p. 38a). He noticed the fires on both boats were in bad shape and that the injector had been on on the Williamsport (p. 38a); they were not attended to within the last 3 hours or so (p. 39a). The injector is put on when the boiler needs water and it is operated by hand and it is taken off by hand when the water has reached the required level (p. 40a).

The injector on the Williamsport was on when he saw it (p. 39a) about 14:15 p. m. that night (p. 40a). Andrei's statement made to Captain Wilson 2 days after the accident was offered in evidence and marked plaintiff's exhibit 13 (p. 50a) and it stated:

> "on the Williamsport the injector was on about two hours", (p. 51a).

Melvin Pausley testified that he was the chief engineer of the tug Altoona and took her out the following morning, December 26th (p. 27a), and discovered the street clothes of August Schulz hanging in the engine room, the place where they usually change their clothes, a canvas bag partly open, a pair of overalls was on a locker (p. 28a) and a pair of dress shoes under the clothes and an unopened paper bag (p. 29a).

Officer Brennan produced the official police records which showed the police grappling for the body of a male missing from a Penn tug since 7 p. m. December 25th (p. 25a).

In the police report of missing persons it stated:

> "Missing since 1900 12/25/49 last seen on Penn Tugboat Altoona docked at Pier H, Jersey City. May have fallen overboard" (p. 26a).

On January 31st at 11:55 a. m. the body was found floating in water off Pier F, Jersey City (p. 26a). He had on white shorts and black socks (p. 240 Trans.). This is the next pier to Pier H where the Altoona was docked.

> "When body was found in the water there was a flashlight in one of his hands" (p. 27a).

The autopsy report revealed no external marks and stated it was death by drowning. Plaintiff's exhibit 11

(p. 24a Trans.). The death certificate set forth the date of injury as December 25, 1949, as occurring while at work, and that the cause of death was drowning probably accidental (Exhibit).

It was conceded by the defendant that the decedent did not commit suicide, that there was no foul play (pp. 2a, 3a) and that he was not under the influence of alcohol (p. 11a). It was admitted that he met his death by accident (p. 2a).

As proof in support of her claim of negligence of the defendant, the plaintiff produced the witnesses who were employed by the defendant on the night in question. The dispatcher, Corcoran, stated there were no lights aboard these tugs (p. 8a), that in the performance of their work the firemen used a flashlight, because it was dark on these boats (p. 9a); the purpose of the flashlight was to be able to see better and check the water on the boats better and in order to get from one boat to another when he has a tier of boats to take care of. (p. 9a).

Frederick Stetson, assistant foreman, attempted to limit his testimony on deposition that while stepping from one boat to the other that night he was using his railroad light by stating in some circumstances he must use a light (p. 16a) otherwise he wouldn't be able to see anything (p. 17a) and then finally admitted it was the truth (p. 24a). Also, in Stetson's deposition he testified that they washed the decks down every night by the crew when they tie up (p. 19a) but at the trial did not know whether they washed it that night (p. 20a) and admitted it would not be proper to wash down the decks that night when the temperature was 10 above zero as you would have ice (p. 21a).

Cunliffe, a fireman aboard tugs in the 2nd tier that night, between 5 p. m. and 1 a. m., testified that the four tugs to which Schulz was assigned were unlighted and dark (p. 37a).

Andrei, tug fireman assigned to the tugs Princeton and Williamsport between 11 p. m. and 7 a. m., testified that the tugs were unlighted and dark (p. 41a) and that in crossing from one tug to another tug he used a flashlight or a lantern (p. 43a), that the floodlights did not light up any portion of the tugs other than the side of the tug against the pier (p. 50a).

Casamento, a tug fireman aboard the Altoona that night about 12:30 a. m., testified it was dark (p. 53a) and that floodlights did not light up the part furthermost from the pier.

Conlon, a tug fireman who started to work at midnight, the night in question, stated that the Williamsport and Fort Wayne, 3rd and 4th boats out, were dark (p. 60a), that the floodlights only helped to light up the position of the tug alongside the pier itself (p. 60a). He also testified to ice on the 4 boats in Schulz's pier (p. 61a).

Andrei stated that a fireman could not properly take care of more than 2 boats (p. 49a). All the tug firemen who testified stated that they were assigned to 2 tugboats that night.

The duties of a watch fireman are undisputed. Pausley, the chief engineer of the Altoona, stated it consisted of watching the water in the boilers, water in the bilges and to keep the fires with a certain amount of steam on the boiler (p. 29a). Schulz's duties were described by Stetson (p. 21a). The duties of a watch fireman and a fireman on a running tug are the same (pp. 30a-31a) except for the amount of steam pressure. The qualifications are the same (p. 31a); men are assigned according to the seniority to whatever job is open on 3 types of boats (p. 31a): a route boat that goes out for 4 or 5 days, a running boat which goes out for 8 hours or as watch fireman on a boat tied

up over night (p. 31a). Proof that Schulz was on a running boat the previous night, December 24th, was not permitted by the court (p. 58a).

At the conclusion of the case, the defendant moved for a direction of verdict in favor of defendant which the court granted (p. 62a).

On appeal to the Circuit Court of Appeals for the Second Circuit, the judgment was affirmed.

Reasons for Allowance of the Writ

The Court of Appeals for the Second Circuit in its decision affirming the judgment below, differed from a case involving similar facts decided by the Court of Appeals for the Fourth Circuit.

In *Sadler* v. *Pennsylvania R. Co.*, 159 F. 2d 784 (4th Cir.), Justice Parker speaking for the court stated:

> "The two barges were car floats of the defendant, approximately 350 feet in length. They were moored near together but not as close to each other or to the dock as was possible, and as a result they had drifted until they were three feet apart amidships and six to ten feet at their offshore ends. There was evidence that the guard rails surrounding them were rotten and broken in places and that they were so inadequately lighted that employees found it necessary to use flashlights in going about them on the night in question.
>
> * * * * * *
>
> The theory of plaintiff is that decedent was going from one barge to the other, when in some way, because the barges had drifted apart, because of the defective condition of the guard rails, because of the defective lighting or because of the combination of all these

things, he fell or was thrown between the barges into the water. No one saw him fall, but, when discovered, he was in the water between the barges about amidships, was calling for help and, by treading water, was managing to keep himself afloat.

* * * * * *

We think that the trial judge was in error in limiting the jury's consideration of negligence to what occurred in the attempt at rescue. While it is impossible to say with certainty what caused decedent to fall between the barges, it is a reasonable inference from the evidence that in attempting to go from one to the other he fell between them as a result of the defective lighting. There is nothing to indicate that he was shoved or pushed overboard, or that he was intoxicated, or that he was attempting to commit suicide. Under such circumstances the cause of the fall can no more be said to be speculative than in the case of a man found in the hold of a vessel beneath an unguarded hatch. See Johnson v. Griffiths S.S. Co., 9 Cir., 150 F. 2d 224. It is the duty of the vessel to provide a safe working place for members of its crew; and where there is evidence that it failed to do so and proof of circumstances from which it can reasonably be inferred that injury resulted from such failure, the case is for the jury. It is elementary that proximate cause need not be established by direct evidence but may be proven by circumstances. 38 A. Jur. 1033."

Therefore this decision of the Circuit Court of Appeals for the Second Circuit is in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in the *Sadler* v. *Pennsylvania Railroad* case.

The Court of Appeals decision which sustained the court below in dismissing the case and refusing to permit the

jury to pass upon the fact questions involved is in conflict with the principles of law enunciated by this Court in the *Lavender* v. *Kurn* case, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916. The trial judge in his oral decision, stated "there is some evidence of negligence and there is an accidental death," but dismissed the case on the ground "For the jury to arrive at the conclusion of causal connection, the vehicle could not be reasonable inference but only sheer speculation." The Court of Appeals in its decision held "We have no way of knowing how or where the accident occurred, and cannot say that it was proximately caused by any default on the part of the defendant." Thus the courts, both the trial judge and the Court of Appeals, failed in considering the evidence, to comply with the doctrine of law enunciated by the U. S. Supreme Court in the *Lavender* v. *Kurn* case which held:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

On the basis of the *Lavender* case, this Court granted a Writ of Certiorari in the case of *Harsh v. Illinois Terminal Railroad Co.*, 348 U. S. 809, 75 S. Ct. 35, and then on February 14, 1955 reversed the judgment, 75 Supreme Court 362.

In the case of *Wilkerson v. McCarthy*, 336 U. S. 53, 69 S. Ct. 413 this Court in an opinion written by Justice Black stated:

> "There are some who think that recent decisions of this Court which have required submission of negligence questions to a jury make, 'for all practical purposes, a railroad an insurer of its employees.' See individual opinion of Judge Major, Griswold v. Gardner, 7 Cir., 155 F. 2d 333, 334. But see Judge Kerner's dissent from this view 155 F. 2d 333, at page 337 and Judge Lindley's dissenting opinion 155 F. 2d 333, at pages 337, 338. This assumption, that railroads are made insurers where the issue of negligence is left to the jury, is inadmissible. It rests on another assumption, this one unarticulated, that juries will invariably decide negligence questions against railroads. This is contrary to fact, as shows for illustration by other Federal Employers Liability cases * * *. Moreover this Court stated some sixty years ago when considering the proper tribunal for determining questions of negligence: 'We see no reason, so long as the jury system is the law of the land and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others.' Jones v. East Tennessee, V. & G. R. Co., 128 U. S. 443, 445, 9 S. Ct. 118, 32 L. Ed. 478. And peremptory instructions should not be given in negligence cases 'where the facts are in dispute, and the evidence in relation to them is that from which fair

minded men may draw different inferences.' Washington & G. R. Co. v. McDade, 135 U. S. 554, 572, 10 S. Ct. 1044, 1049, 34 L. Ed. 235. Such has ever since been the established rule for trial and appellate courts. See Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 67, 68, 63 S. Ct. 444, 451, 452, 87 L. Ed. 610, 143 A. L. R. 967. Courts should not assume that in determining these questions of negligence juries will fall short of a fair performance of their constitutional function. In rejecting a contention that juries could be expected to determine certain disputed questions on whim, this Court, speaking through Mr. Justice Holmes, said 'But it must be assumed that the constitutional tribunal does its duty, and finds facts only because they are proved.' Aikens v. State of Wisconsin, 195 U. S. 194, 206, 25 S. Ct. 3, 6, 49 L. Ed. 154.

In reaching its conclusion as to negligence, a jury is frequently called upon to consider many separate strands of circumstances, and from these circumstances to draw its ultimate conclusion on the issue of negligence. * * * For these reasons, the trial court should have submitted the case to the jury, and it was error for the Utah Supreme Court to affirm its action in taking the case from the jury.

In the same decision Justice Douglas concurring, stated:

"The criterion governing the exercise of our discretion in granting or denying certiorari is not who loses below but whether the jury function in passing on disputed questions of fact and in drawing inferences from proven facts has been respected."

The historic role of the jury in performing that function, see Jones v. East Tennessee, V. & G. R. Co., 128 U. S. 443, 445, 9 S. Ct. 118, 32 L. Ed. 478; Washington & G. R. Co. v. McDade, 135 U. S. 554, 572, 10 S. Ct.

1044, 1049, 1050, 34 L. Ed. 235; Bailey v. Central Vermont Ry., supra, is being restored in this important class of cases."

A review of the evidence set forth under the statement of the case shows ample evidence that the tugboats were unlighted and dark, that the floodlight cast light only on the portion of the vessel alongside the pier but that the other 3 vessels abreast were dark, and that the tug firemen used flashlights in order to enable them to see and in order to get from one boat to another. Dispatcher Corcoran (p. 9a) and Stetson, foreman (p. 24a) admitted using flashlights when stepping from one boat to the other. The tug firemen who were on duty that night likewise testified to the dark conditions and to using flashlights in crossing tubs (Andrei (p. 41a), Cunliffe (p. 37a), Casamento (p. 53a), Conlon (p. 60a)). There was also evidence of icy conditions (Stetson (pp. 19a, 20a, 21a), Conlon (p. 61a)). This has a bearing on the additional dangers in the winter time which necessitate a duty commensurate with the risk to provide adequate lighting to the tug foremen.

The plaintiff's case is based upon circumstantial evidence, there being no eyewitness to Schulz's death. It was conceded by defendant that Schulz did *not* meet his death by suicide, foul play or intoxication (pp. 2a, 3a). It was admitted he met his death by accident (p. 2a). The death certificate stated cause of death as drowning probably accidental. The autopsy report revealed no external marks and stated that it was death by drowning. The police report when Schulz was missing stated "last seen on Penn Tugboat Altoona docked at Pier H, Jersey City," which is the next pier to Pier H where Altoona was docked. He was clothed in his underwear with a flashlight in one of his hands (p. 27a).

His street clothes were found on the Altoona in the upper engine room where the firemen usually undress, by Stetson about 1:25 a. m. (p. 18a). The canvas bag containing his work clothes was partly opened, his dress shoes were under the clothes and the paper bag containing his lunch was unopened (pp. 28a, 29a). He was last seen alive between 7:00 and 7:15 p. m. by dispatcher Corcoran walking in the direction of the tug Altoona (p. 6a).

It is definitely established that Schulz met his death on December 25, 1949 between 7:00 p. m. when Corcoran last saw him and 1:25 a. m. when Stetson found his street clothes on the Altoona. This time element can be further narrowed. Casamento, tug fireman, went aboard the Altoona about 12:30 a. m. and found the fires were poor, the water in the boiler was low and the steam low, and was unattended to for 2, 3 or 4 hours (p. 52a). Andrei went aboard the Williamsport, 4th tug out, at 11 p. m. and noticed fires in bad shape (p. 38a) and unattended within the last 3 hours or so (p. 39a). This indicates that Schulz last tended the fires about 8 p. m., so that he met his death some time between 7 p. m. and 8 or 9 p. m. We have the date and the time established. Now the place of his death.

Schulz's street clothes were found on the Altoona and his work clothes were still in the canvas bag in the engine room. His body was found dressed in his underwear. It can be reasonably inferred that he was changing his clothes when something happened requiring him to go out on the vessel with a searchlight in his hand. The evidence is undisputed that Andrei at 11 p. m. found the injector had been on in the Williamsport (p. 38a). He so stated in his statement to the defendant taken 2 days after the accident (p. 50a). It was on about 2 hours (p. 51a). The Williamsport was the 4th boat out and abreast of the Altoona. The last person on the Williamsport previous

to Schulz was Barker, who took off all injectors when he left the boats about 5 p. m. (p. 35a). After Barker and before Andrei, the only person aboard the Williamsport could only have been Schulz. Corcoran, dispatcher, testified that Schulz was the only fireman attached to those 4 tugs during the time mentioned (p. 8a). The injector is put on and taken off manually by hand (p. 30a). It therefore appears that it can be reasonably inferred that Schulz was the only person who had put the injector on the vessel Williamsport and that it must have been put on about 9 p. m. and never taken off until Andrei arrived at 11 p. m. In order to put on the injector on the Williamsport, Schulz had to cross from the Altoona where he took off his street clothes to the Williamsport which was the 4th tug abreast. He reasonably met his death some place between the Williamsport when he put on the injector and his return to the Altoona where he was changing his clothes.

It is for the jury to infer reasonably the conditions which may have prompted Schulz to leave the Altoona in his underwear with a searchlight in his hand. Chief Engineer Pausley testified the injector is put on in cooling down the boiler when it reaches the maximum steam (p. 32a). Andrei said that when the safety valve goes off due to excessive steam it makes a loud hissing noise (p. 42a). Casamento said it makes a loud whistling noise (p. 55a).

The jury from this circumstantial evidence can reasonably infer that an emergency arose while Schulz was changing into his working clothes on the Altoona, that he hurried in his underwear with a searchlight in his hand across the four tugboats to the Williamsport, 4th tug out, and put on the injector because the boiler needed water (p. 42a), that in returning to the Altoona where he had his clothes, he fell into the water and was drowned. The jury could, in considering the darkness shown to be existing about

the tugboats and the weather conditions, with or without the presence of ice, and the hazards existing in crossing from one boat to another boat, reasonably infer that the negligence of the defendant caused or contributed to the death of Schulz by accidental drowning. The trial judge erred in not submitting the case to the jury for its determination.

It therefore appears that the Court of Appeals erred in failing to reverse the judgment below so as to restore to the jury the historic role of passing on disputed questions of fact and inferences therefrom, in conflict with the above cited decisions of this Court. Unless this Writ of Certiorari is granted and this error corrected, it will result in prejudice to the substantial rights of this plaintiff and of other persons whose cases might be decided in a similar fashion contrary to the decisions of this Court.

CONCLUSION

For the above reasons a Writ of Certiorari should be granted as prayed for.

Respectfully submitted,

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